

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.16093 of 2009

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M/s Himangshu Paul through its one of the Partners Mr. Ashish Paul, Son of Sri Himangshu Paul, resident of Mohalla- Club Road, P.S.- Sadar, P.O.- Silchar, Distt.- Cachar, State- Assam

.... Petitioner

Versus

- 1.The U.P. State Bridge Corporation Ltd. (A U.P. State Government Undertaking) through its Project Manager, Rail Bridge Construction Unit, Patna, East Central Railways Campus, Dighaghat, Patna- 800011
2. The Project Manager, The U.P. State Bridge Corporation Ltd. (A U.P. State Government Undertaking) Rail Bridge Construction Unit, Patna, East Central Railways Campus, Dighaghat, Patna- 800011
3. The Dy. Project Manager, The U.P. State Bridge Corporation Ltd. (A U.P. State Government Undertaking) Rail Bridge Construction Unit, Patna, East Central Railways Campus, Dighaghat, Patna- 800011
4. The Joint Manager Director (Contract), U.P. State Bridge Corporation Ltd., Setu Bhawan 16, Madan Mohan Malviya Marg, Lucknow (U.P.)
5. The Assistant Engineer (Civil), Guide Bund Work, U.P. State Bridge Corporation Ltd., Setu Bhawan 16, Madan Mohan Malviya Marg, Lucknow (U.P.)
6. The Junior Engineer (Civil), Guide Bund Work, U.P. State Bridge Corporation Ltd., Setu Bhawan 16, Madan Mohan Malviya Marg, Lucknow (U.P.)
7. The Zonal Manger, East Central Railway, Hazipur (Bihar)
8. The Chief Engineer (Construction), Ganga Rail cum Road Bridge, East Central Railway, Mahendrughat, Patna

.... Respondents

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Appearance:

For the Petitioner	:	Mr. Rajendra Narain, Sr. Advocate Mr. Manish Sahay, Advocate Mr. Anil Kumar Sinha, Advocate
For the Resp. UPSBCL :		Mr. J.S.Arora, Sr. Advocate
For the Resp. Railway :		Mr. Binod Jee Verma, Advocate Mr. Mahesh Prasad, Advocate

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CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

CAV JUDGMENT

Date: 20.11.2018

The present writ petition has been filed for the following



reliefs—

I. *“For commanding and directing the concerned respondents to pay the petitioner a sum of Rs. 3,04,05,285/- only with regard to following items, after closing the agreement No. 01/CAMP/Dy. PM/PATNA dated 30.01.2006, without imposing risk and cost upon the petitioner because the delay is not attributable upon the petitioner for which, only respondents are responsible.*

(a)	Claim Bill for extra lead involved in carriage of loading from stockyard of Railway upto 15.04.2008.	Rs. 2,00,37,565/-
(b)	Withheld money against forest royalty	Rs. 3,67,655/-
(c)	Withheld money deduction against running account bill	Rs. 2,00,000/-
(d)	Bill for work done, not yet measured	Rs. 18,00,000/-
(e)	Entire Security Deposit Amount (as deducted from the bill of the petitioner.	Rs. 80,00,000/-
Total		Rs. 3,04,05,285/-

- II. *For further directing the concerned respondent to pay the escalation prices of the materials and labour cost etc. on account of delay due to handed over the North Bank-Sonepur site on 10.02.2008.*
- III. *For further directing the concerned respondent to consider the claim of the idle charges of machinery and vehicle and t pay a sum of Rs. 63.00 lakhs (approx) for the said claims.*
- IV. *For further commanding and directing the concerned respondent to pay the interest @ 18% per annum upon the said amount from due date and till the date of its realization.*
- V. *For pass such an order or orders for which the petitioner is entitled under the law in the facts and circumstances of this case.”*

2. At the outset itself learned Senior Counsel Mr. Rajendra Narain confines the writ petition with respect to prayer no. 1 (a) for payment of Rs. 2,00,37,565/- towards extra leads involved in carriage. The remaining prayers are accordingly rejected as not pressed.

3. The short facts of the case according to the petitioner are that



Agreement No. 01/CAMP/Dy. PM/PATNA dated 30.01.2006 for a value of Rs. 17,65,14,100.00 was entered into between the petitioner firm and the U.P. State Bridge Corporation Ltd., (hereinafter referred to as 'the UPSBCL') (respondent no. 1) for construction of Guide Bund, slope pitching and launching apron on north and south side of Rail Ganga Bridge, Patna towards upstream and downstream sides as per drawing and specification. The said work had been awarded to UPSBCL by the East Central Railway under a separate agreement executed between them. The UPSBCL in turn awarded the said work to the petitioner as its Sub-contractor. The petitioner was, inter alia, required to carry supplied materials like boulders from the stacking yard to the site of work at its own cost. Certain clauses of the General Conditions of Contract (GCC) forming part of the agreement may be reproduced hereinbelow for the sake of convenience –

30. Boulders required for the apron and pitching work will be supplied free of cost by department from its stacking yard shown in the CE/GB drg. No. 3-2002 and 4-2002 enclosed. They will have to be taken over at the stacking yard and transported by the contractor at his own cost to the site of work. The rates quoted by contractor for items involving department boulders should include the cost of loading, unloading, re-handling, transporting carriage with all lead, lift and descent. The contractor at his own cost shall return and handover at supply points the departmental materials, which are rendered surplus to the requirement. The Corporation shall not be responsible for the loss and damage of materials during transit, from the point of delivery to be made by the Railway to the site of work.

36. The boulders required for the work will be handed over to the contractor in the boulder stacking yard after joint measurement by contractor's representative and the department. Once the stack is handed over, contractor will be responsible for its accounting.

37. A large quantity of boulders will have to be transported by the



contractor from the department stacking yard to the site of work. In view of the limited working period available, the contractor shall make arrangement for mechanical loading of boulders at the stacking yards. The rates quoted by the contractor for item involving use of boulders shall be deemed to include the cost of making all such mechanical arrangements for loading, transportation and unloading including incidentals.

38. The full quantity of 40-50 kg. boulders required for pitching of slopes or laying of aprons of Guide Bunds and connecting approach banks shall be issued to the contractor from the stacking yard of Railways. The lead involved for the guide bunds will be as follows-

	Lead		
	Average	Maximum	Minimum
North Guide Bund	2.0	3.3	0.7
South Guide Bund	1.25	2.0	0.5

However, the distances mentioned above are approximate and are liable to change depending upon change in location of the Guide Bund to suit the site conditions. The distances are only indicative and are not for the purpose of any measurement of lead. The contractors are advised to verify the actual distances at site. No Claim whatsoever shall be entertained for any change or inaccuracy in the distances mentioned.

39. The road between the stacking yard and the work site if required will be constructed by the contractor at his own cost for which no separate payment will be made. In case existing roads are used which pass through villages, built up bazaar/commercial area of have some sharp/blind turning the contractor shall arrange to regulate the movement of his vehicles at such locations by posting flagmen etc. so as to ensure that no road accident occurs due to heavy traffic movements.

50. It shall be ensured that the works are carried out according to the agreed programme and no changes are made except with the prior approval of the instance of the Engineer.



4. In course of execution of the agreement, however, it was found that the supplied materials like boulders were required to be lifted from a place situated far beyond the distance contemplated in Clause 38 of the agreement, leading to burden of extra lead for carriage of such materials to the site of work. A claim for such extra lead was raised by the petitioner, but running account bills did not include the extra lead. Despite several hurdles and impediments, the petitioner completed more than 85% of the work.

5. Mr. Rajendra Narain, learned Senior Counsel appearing on behalf of the petitioner, submits that the petitioner was required to lift the materials like boulders from the Railway stack yard situated within the distance contemplated in Clause 38 of the agreement. However, it stands admitted even by UPSBCL that the stone boulders were made available for lifting at a location at a far greater distance. It is also not in dispute that the extra expenditure for carriage of boulders came to about Rs. 187.00 lakhs upto 30.06.2007 which was likely to increase till the conclusion of the contract. All these facts are evident from the letter of UPSBCL dated 16.10.2007 (Annexure-4) by which the UPSBCL raised claim for the extra lead with the Respondent-East Central Railway. In the said letter it was noted that the extra lead for south side (Patna side) was 1.76 kms., for north side (Sonepur side) it was 3.998 kms. at locations between level crossing no. 3 and Pahleja Ghat it was 5.28 kms. and at location near level crossing no. 4 it was 5.78 kms. By subsequent letter dated 08.05.2008 (Annexure-3), the petitioner once again requested for payment of revised claim bill for extra lead upto 15.04.2008 which worked out to Rs. 2,00,37,565.00 and sought early settlement of the claim bill. By letter dated 19.06.2008 (Annexure-6), the UPSBCL changed its stand and informed the petitioner that the claim for extra lead involved in carriage of stone boulders is unjustified



and in violation of the conditions of agreement which was accordingly not admissible. The petitioner reiterated its claim by letter dated 16.10.2008 (Annexure-7), informing that the lead for the carriage of balance quantity of boulders should be as per specified lead on the terms of the agreement, otherwise resumption of balance work would not be possible. The letter of the petitioner was responded to by the UPSBCL by letter dated 06.11.2008 (Annexure-8), informing that the claim of the petitioner was processed through arbitration with Railway and would be considered if the matter was resolved in favour of UPSBCL. It was also stated that the boulders had then started to be stacked near the Guide Bund within the specified lead as per the agreement. It is therefore submitted that there is no dispute whatsoever that extra expenditure had been incurred by the petitioner for lead involved in carriage of stone boulders and the claim in this regard up to 15.04.2008 could not have been denied.

6. In the alternative, it is submitted on behalf of the petitioner that the UPSBCL is liable to pay compensation to the petitioner in terms of Section 70 of the Indian Contract Act, 1872 (hereinafter referred to as 'the Act'), which reads as follows –

"70. Obligation of person enjoying benefit of non-gratuitous act- Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

In the instant case, the petitioner incurred extra expenditure in view of his obligations under the contract, making it evident that the work done was not intended to be gratuitous in nature, in its turn the UPSBCL did not reject the work and enjoyed the benefit thereof. The



ingredients of Section 70 of the Act are fulfilled and the UPSBCL is bound to make payment of compensation to the petitioner.

7. Reliance is placed on the following decisions—

- (i) AIR 1962 SC 779 (State of West Bengal vs. M/s B.K.Mondal and Son)
- (ii) (1969) 3 SCC 769 (Sm. Gunwant Kaur and others vs. Municipal Committee, Bhatinda and others).
- (iii) AIR 2009 Calcutta 284 (Engineer Co-operative Society Ltd. vs. A & N Administration and others).
- (iv) (2004) 3 SCC 553 (ABL International Ltd. and Anr. vs. Export Credit Guarantee Corporation of India Ltd. & Ors.)

8. Learned counsel for the respondent- UPSBCL on the other hand vehemently resists the writ petition. A preliminary objection is raised with regard to non-maintainability of the writ petition in view of the disputed facts involved. Such objection was permitted to be raised at the time of hearing, in terms of order dated 06.02.2015 passed by this Court.

9. It is submitted on behalf of the UPSBCL that the work in question was awarded to the petitioner as sub-contractor on back to back basis, meaning thereby that the petitioner would be entitled for payment in respect of quantity of work accepted by the Railway. The petitioner raised a claim for extra lead contrary to the agreement and did not resume the work despite the respondents having extended the time for execution of work and as a result, the UPSBCL suffered considerable loss and finally terminated the agreement at the risk and cost of the petitioner. It is further stated that even after attachment of the security deposit of the petitioner,



UPSBCL is entitled to recover roughly about Rs. 2.70 crores towards extra cost incurred in taking work from another agency and further amounts on other counts, in all aggregating to Rs. 3.83 crores. It is further submitted that the petitioner has merely sought to raise a money claim without any point of law being involved, which is thus beyond the purview of writ jurisdiction.

10. Without prejudice, it is further submitted that even on merits, the petitioner has no claim in view of Clause 38 of the GCC according to which the distance was merely indicative and not to be used for the purposes of any measurement of lead. It was categorically stated that no claim whatsoever would be entertained for any change or inaccuracy in the distances mentioned. It is further submitted that the UPSBCL is not liable to make any payment to the petitioner in pursuance of the back to back agreement inasmuch as the claim was not admitted by the Railways and no payment had been received, as clarified in its letter dated 19.06.2008 (Annexure-6). More significantly it is pointed out that the petitioner has not brought a copy of the entire agreement dated 30.01.2006 on record as the Annexures thereto are not complete and which have been brought on record in the supplementary counter affidavit filed by the UPSBCL.

11. It is pointed out that the form of 'letter of application by the tenderer' (at page 334) required the petitioner to certify that it had perused the tender documents and visited the sites and had satisfied itself as to the nature of work and site condition. Clause 11 of the Technical Specification and the Special Conditions of Contract (at page 357) clearly provided that the quoted rate for boulder would be of approved quality and specification, would include the



cost of boulder, its transportation to the work site and stacking. Clause 64 of the GCC (at page 32) further stated that the contractor would not be entitled to make any claim under the cover of that contract, nor the UPSBCL would entertain and consider any sort of claim made by the contractor. Learned counsel for the UPSBCL also invites reference to the agreement form (Annexure-1), Clause 4 whereof adopts and deems certain documents to form and be construed as part of the agreement including the form of agreement, meaning thereby the main agreement entered into between the UPSBCL and the East Central Railway (for short "the ECR"). It is therefore, submitted that the petitioner is bound to abide by the decision of the ECR as the principal agreement and the agreement between the petitioner and the UPSBCL are both interlinked.

12. I have heard the parties at length and have given my careful consideration of the materials on record. The petitioner has restricted his claim only with respect to payment for extra lead. From the various correspondences adverted to by the petitioner, a case is sought to be made out that as against the expected lead indicated in Clause 38 of the agreement, the actual lead was far in excess, which necessitated extra cost to be incurred by the petitioner. At first brush, the submission of the petitioner appears rather attractive. However, there is another facet of the matter which cannot be ignored. As pointed out on behalf of the respondents, a reading of the agreement as a whole presents a slightly different picture, particularly in view of the annexures to the agreement left out by the petitioner and later brought on record by the UPSBCL. The moot question is whether, even if the work involved extra lead, the petitioner could be heard to complain in that regard. There are ample provisions in the agreement itself to



indicate that it was the duty of the petitioner to satisfy itself with respect to the nature of work and site condition at the threshold itself, as the quoted rate for boulder had to include the cost of transportation to the work site and stacking. More significantly, the petitioner had agreed that it would not be entitled to make any claim and that UPSBCL would not entertain and consider any claim made by the petitioner under the cover of the contract. Clause 4 of the agreement form adopted the principal agreement between the UPSBCL and the respondent-ECR. As such the petitioner cannot claim a right over and beyond what was found admissible by the respondent-ECR. In the present case, the petitioner's claim was forwarded by UPSBCL to the ECR and the petitioner was informed by letter dated 06.11.2008 that the claim of the petitioner would be considered if the matter was resolved in its favour upon being processed through arbitration with the Railway. The petitioner cannot therefore claim an independent right to be paid for the extra lead regardless of the result of arbitration with Railway. Moreover, the UPSBCL in para 13 of its counter affidavit has made averments with respect to a counter claim for Rs. 3.83 crores against the petitioner by way of loss incurred by it by reason of default on the part of the petitioner, which may also require consideration.

13. The petitioner has relied on Section 70 of the Indian Contract Act, 1872 in the alternative to submit that the conditions thereof having been fulfilled, UPSBCL was liable to make payment for the extra lead. Reliance has been placed on various decisions noted above. The submission of the petitioner appears appealing but only until a closer scrutiny is made. In my view, Section 70 of the Act, which appears under Chapter V "Certain Relations Resembling those created by Contract" cannot operate to supersede the specific



terms agreed upon by the parties under a written contract.

14. In the present case, the parties have specifically agreed that no claim under the cover of the contract would either be raised by the petitioner or entertained by the UPSBCL and hence Section 70 of the Act cannot be brought into play under such circumstances. The judgment of the Hon'ble Supreme Court in *State of West Bengal vs. M/s B.K.Mondal and Son*, AIR 1962 SC 779 relied upon by the petitioner also supports the above view. In that case, the application of Section 70 of the Act was being considered in the backdrop of an alternative submission that the contract in question was invalid. The Hon'ble Supreme Court observed in para 14 of the judgment as follows —

“14..... Section 70 occurs in Chapter V which deals with certain relations resembling those created by contract. In other words, this chapter does not deal with the rights or liabilities accruing from the contract. It deals with the rights and liabilities accruing from relations which resemble those created by contract.....”

15. The other decision in *Engineer Co-operative Society Ltd. vs. A & N Administration and Others*, AIR 2009 Calcutta 284 (*supra*) relied upon is also in the same vein to the effect that Section 70 of the Act comes into operation only in the absence of a contract. This is evident from the observations in para 2 of the judgment as follows —

“2. Section 70 in the statute book has been provided in case where there is no contract but something has been done by one party not intending to do so gratuitously and the other party has taken benefit without any



demur and objection and obviously the party who has taken benefit is bound to compensate.....”

16. I need not delve into the issue of maintainability of the writ petition as urged by the UPSBCL. In the given facts and circumstances of the case and in view of the provisions contained in the agreement entered into between the parties, I am not inclined to interfere in the matter in exercise of powers of extraordinary writ jurisdiction. It will however be open to the petitioner to seek redressal of its grievances before any other forum as may be available to it in accordance with law.

17. The writ petition stands dismissed.

(Vikash Jain, J)

Chandran

AFR/NAFR	AFR
CAV DATE	25.10.2018
Uploading Date	20.11.2018
Transmission Date	NA

